NO. 724

IN THE

Supreme Court of the United States

October Term, 1966

FRANK A. DUSCH, ET AL.,

Appellants,

v.

J. E. CLAYTON DAVIS, ROLLAND D. WINTER, CORNELIUS D. SCULLY AND HOWARD W. MARTIN,

Appellees.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR APPELLANTS

HARRY T. MARSHALL
City Attorney
Courthouse Drive
Virginia Beach, Virginia 23456

HARRY FRAZIER, III
KURT BRAGDEN
Hunton, Williams, Gay,
Powell & Gibson
700 East Main Street
Richmond, Virginia 23212

Of Counsel

ARCHIBALD G. ROBERTSON
Hunton, Williams, Gay,
Powell & Gibson
700 East Main Street
Richmond, Virginia 23212
Counsel for Appellants

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THE APPLICABILITY OF ONE MAN, ONE VOTE PRINCIPLES WAS RAISED BELOW

While the question of the applicability to local governing bodies of one man, one vote principles as enunciated in *Reynolds* v. *Sims*, 377 U.S. 533 (1964), may not have been presented in precise terms to the Court of Appeals for the

Fourth Circuit, no one can seriously argue that the issue was not presented to and decided by that court. The question framed by Voters in their appeal below was "Is the Seven-Four Plan constitutional?" This is really two questions in one because it first requires a determination that *any plan* is subject to the United States Constitution. The Court of Appeals made such a determination, stating in part:

> "The principle of one-person-one-vote extends also to the level of representation, and exacts approximately equal representation of the people—that each legislator, State or municipal, represent a reasonably like number in population. . . ." (R. 119)

Yet, even if the opinion of the Court of Appeals had failed to show that the issue was explicitly raised below, such is not required anyway. This Court has held that no more is required than that the record as a whole show that the matter was brought to the attention of the court, either directly or indirectly.

For example, in *Braniff Airways, Inc.* v. *Nebraska State Board*, 347 U.S. 590 (1954), the issue was whether Braniff's aircraft attained a situs within Nebraska for the purpose of state taxation. Both in the lower court and in this Court, Braniff relied solely on the commerce clause in maintaining that no situs was acquired. At no time was a due process argument mentioned. In holding that the point was nevertheless properly raised, the Court said (pages 598-99):

> "While the question of whether a commodity en route to market is sufficiently settled in a state for purpose of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare

question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process. However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented. See *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67, and cases cited; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson and Kurland ed.) 149 *et seq.*"

In *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928), this Court, in discussing the applicable principles, said:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." (Footnotes omitted)

Voters contend that in order to be able to argue here the applicability of one man, one vote Officials should have separated the question posed by Voters into its two com-

ponents.* This is not required by logic or by prior decisions of the Court.

FLEXIBILITY IS ESSENTIAL IN APPLYING ONE MAN, ONE VOTE PRINCIPLES TO LOCAL GOVERNMENT

In his enthusiasm for a full application of one man, one vote principles of *Reynolds* to the broad spectrum of local governing bodies the Solicitor General presses for an automatic application of rigid mathematical rules. He refuses to acknowledge that there are any differences between state and local legislative bodies. It would indeed be unfortunate for this Court to make the same error.

Three cases cited by the Solicitor General illustrate our position that deviation from strict population based standdards may be permissible when supported by reason.

Blaikie v. *Wagner*, 258 F. Supp. 364 (S.D.N.Y. 1965) upheld the apportionment of the thirty-seven member council of New York City. While twenty-seven councilmen are elected from districts of substantially equal population, two additional councilmen are elected from each of the five boroughs which range in population from 221,991 for Staten Island to 2,627,313 for Brooklyn. The two borough councilmen are elected at large by the voters of the borough. No party may nominate more than one candidate to be elected at large in any borough and no one may vote for more than one at large candidate. Reflecting the importance of recognizing the diverse character of the voting population and the broad range of local problems, the court inquired (pages 367-68):

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* The reason for separating the question in this Court is that it has never before been presented here. Such was not necessary in the Court of Appeals because it had already decided the precise question in *Ellis* v. *Mayor and City Council of Baltimore*, 352 F. 2d 123 (4th Cir. 1965).

> "What would the councilman from Tottenville, Staten Island, know from direct and daily experience of the local problems of Canarsie, Brooklyn, or the councilman from the Westchester line of the Bronx know of the racial and housing congestion problems of the lower east side of Manhattan? The first focal point for judicial scrutiny is whether the councilmen representing Canarsie and Tottenville can by teaming up together impose the will of a small number of voters upon a much larger group who by reason of inadequate representation are unable to resist."

The avowed purpose of the plan was to provide minority party representation to all boroughs. Despite the deliberate disproportion of voting strength favoring the less populated boroughs, the court found a "rational justification" for the plan and held that it did not violate the equal protection clause.

The court in *Blaikie* was concerned with representation of national and racial minorities. At pages 70-72 of his brief the Solicitor General exhibits a concern for racial minorities. At Virginia Beach our concern is with an economic minority. Although agrarians constitute a minority of the city's population, agriculture is the city's largest industry and more than one-half of its area is rural. We are aware of no other constitutional means of guaranteeing a voice in city affairs to this important minority group.

Another decision recognizing the important need for an element of discretion in the manner in which local government shall conform to one man, one vote principles is *Town of Greenburgh* v. *Board of Supervisors,* 157 New York Law Journal, No. 29, p. 18 (Feb. 3, 1967). In acknowledging the need for flexible rather than rigid standards and for a consideration of local conditions and problems, the Supreme Court of New York State said:

"Plans which provide for reapportionmnet of county legislative bodies will necessarily deal with varying conditions in different counties. Each should be judged in the light of its own provisions as they deal with local conditions, and as they affect the citizen's right to fair and effective representation in the legislative body. What may be impermissible with respect to state legislative reapportionment plans may be permissible in county plans, and what may be permissible in one county may be unacceptable in another (cf. *Reynolds* v. *Sims*, supra, 377 U.S. 533, 578, *Swann* v. *Adams*, supra). The equal protection clauses do not require the application of rigid rules in all cases of legislative apportionment, if varying circumstances justify a departture from them, in particular cases, or classes of cases. There are obvious differences between state legislative bodies and county boards of supervisors which justify a different approach to county reapportionment problems, than that which has been approved, so far with respect to state plans. . . .

"The prohibition of the equal protection clauses goes no further than the invidious discrimination (cf. *Williamson* v. *Lee Optical Co.*, supra, 348 U.S. 483, 489); and a legislative apportionment plan which seeks to preserve a separate voice in legislative processes, to the small, as well as the large communities if it can be effected without such discrimination, neither violates that prohibition, nor is it because of that purpose, irrational or unreasonable. . . ."

Only several months ago this Court again recognized that mathematical precision should not be expected in every case, even for state legislatures. *Swann* v. *Adams*, ... U.S. ....., 17 L ed. 2d 501 (Jan. 9, 1967). While admitting that variations would be permitted if there is "a satisfactory explanation grounded on state policy," the Court struck down the Florida legislative reapportionmtnt plans because

there appeared no acceptable reasons for population variances among the districts.

CONCLUSION

The Seven-Four Plan is not subject to any of the usual constitutional objections. It does not vest control of the council in the rural areas, it does not seek to perpetuate any individuals in office and it does not discriminate against racial groups. As pointed out at pages 22-24 of our opening brief, the Seven-Four Plan is a common sense approach to the unique situation prevailing at Virginia Beach.

The plan should be held to be constitutional and the judgment below reversed.

Respectfully submitted,

HARRY T. MARSHALL
City Attorney
Courthouse Drive
Virginia Beach, Virginia 23456

HARRY FRAZIER, III
KURT BERGGREN
Hunton, Williams, Gay,
Powell & Gibson
700 East Main Street
Richmond, Virginia 23212
Of Counsel

ARCHIBALD G. ROBERTSON
Hunton, Williams, Gay,
Powell & Gibson
700 East Main Street
Richmond, Virginia 23212
Counsel for Appellants

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